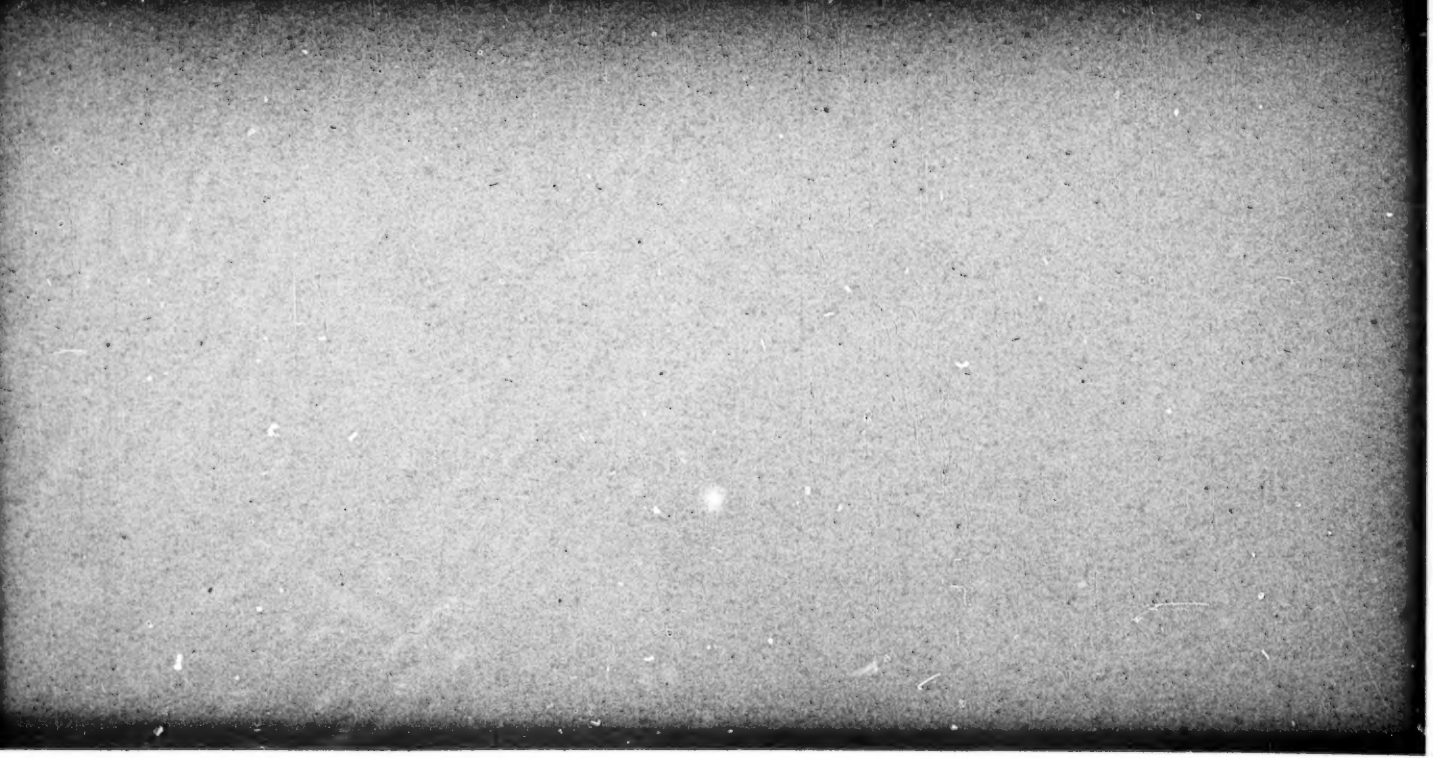

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1856

GILBERT BRYANT FOERSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, should be applied retroactively to invalidate the warrantless search of his vehicle by Border Patrol officers at a fixed immigration checkpoint.

On May 1, 1970, while proceeding north on Interstate Highway 5 between San Diego and Los Angeles in a truck with a "camper shell," petitioner was stopped by Border Patrol officers at a permanent immigration checkpoint located south of San Clemente, California, approximately 62 air miles north of the Mexican border. Petitioner was then directed to a "secondary area," where he opened the camper at the direction of the officers. The agents opened a large cabinet inside the camper to check for aliens and discovered 715 pounds of marijuana.

Prior to trial in the United States District Court for the Southern District of California, petitioner moved to suppress the marijuana on the ground that the search was not supported by probable cause. The motion was denied. After a trial, petitioner was convicted of transporting smuggled marijuana and of conspiring to commit that offense, in violation of 21 U.S.C. (1964 ed.) 176. He was sentenced to seven years' imprisonment. The court of appeals affirmed *per curiam* (455 F. 2d 981), stating:

> This court has consistently upheld the right of Immigration officers to stop and investigate vehicles for concealed aliens, as was done here, without a showing of probable cause.

After this Court's decision in *Almeida-Sanchez,* the judgment of the court of appeals was vacated and the case was remanded for further consideration in light of *Almeida-Sanchez* (413 U.S. 915). Following reconsideration of the case, the court of appeals affirmed the judgment of conviction without opinion, relying on its decision in *United States* v. *Bowen,* C.A. 9, No. 72-1012, decided May 9, 1974, petition for a writ of certiorari pending, No. 73-6848 (Pet. App. 1).

In *Bowen,* the Ninth Circuit, sitting *en banc,* ruled that this Court's decision in *Almeida-Sanchez* —which held that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's prohibition against unreasonable searches and seizures—should be extended to invalidate a similar search for aliens at a fixed Border Patrol checkpoint (Pet. App. 2-33). The court further held, however, that the rule should apply only

to checkpoint searches conducted subsequent to the date of this Court's decision in *Almeida-Sanchez* (Pet. App. 33-46). Since the search of petitioner's vehicle occurred prior to that date, his conviction was affirmed (Pet. App. 1).

Petitioner contends that the court of appeals' holding with respect to checkpoint searches should not be limited to post-*Almeida-Sanchez* searches. But that contention need not be considered if—as we argue in our petition for a writ of certiorari in *United States* v. *Ortiz*, No. 73-2050[1]—warrants are not required for checkpoint searches of vehicles for concealed aliens. We also argue in *Ortiz* that, even if warrants are required, the rule should not apply in the Ninth Circuit to cases, like the present one, in which the search occurred prior to that court's *en banc* decision in *Bowen*, which overturned a long line of prior decisions upholding checkpoint searches without warrants.

Only if the Court were to disagree with both of our contentions in *Ortiz* would it be necessary to consider petitioner's contention in this case, since the checkpoint search here took place not only prior to *Bowen* but also prior to *Almeida-Sanchez*. The issue whether *Almeida-Sanchez* should be applied retroactively to "roving patrol" searches conducted prior to that decision is presented in our petition for a writ of certiorari in *United States* v. *Peltier*,

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[1] In *Ortiz*, the Ninth Circuit held, on the authority of its decision in *Bowen*, *supra*, that evidence seized in a checkpoint search conducted after the decision in *Almeida-Sanchez*, but before the decision in *Bowen*, must be suppressed.

No. 73-2000, and the Court's resolution of that issue may bear upon the proper disposition of petitioner's similar argument with respect to checkpoint searches.

We therefore believe that it would be appropriate to defer disposition of the present petition pending action on the petitions in *Ortiz* and *Peltier*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.